

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

61151 97913

FILE: B-186811

DATE: July 19, 1976

MATTER OF: Dead Bug Edwards Company

DIGEST:

1. Bidder's failure to acknowledge formally advertised solicitation amendment which had other than trivial effect on price and quality of required services may not be waived since there is not slightest indication in submitted bid that bidder received amendment.
2. Bidder's attendance at prebid opening conference where contents of IFB amendment were discussed, coupled with bidder's submission of bid only 2 days after conference, does not necessarily require conclusion that bidder informally acknowledged amendment. Should it have been advantageous for bidder to have avoided award after bid opening, bidder could have argued that lack of formal acknowledgement of amendment meant that it did not receive amendment or did not agree to amendment's terms.

Dead Bug Edwards Company protests the May 1976 rejection of its bid under Department of Agriculture formally advertised solicitation No. 125-M-APHIS-76. The Department issued the solicitation on the morning of May 4, 1976, in order to obtain pesticide spraying services in Broward County, Florida. The Department's contracting officer rejected the bid, which was low for a part of the required services, because of the company's failure to acknowledge solicitation amendment No. 1, issued on the afternoon of May 4, prior to the date (May 6) of bid opening.

The company insists that it informally acknowledged the amendment prior to bid opening. Informal acknowledgement of the amendment should be seen, the company argues, because its representative attended a prebid opening conference called by the Department to discuss possible specification changes. At the conference, the representative allegedly suggested specification changes that were incorporated into the amendment. Moreover,

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since the final amendment was released to all bidders on the afternoon of the day (May 4) on which the conference was held, the company argues that it is absurd to hold that its May 6 bid did not accept the amendment considering the 2-day interval involved.

The contracting officer says that the Department has no record of who submitted the "many, various suggestions" discussed at the May 4 conference. In any event, she insists that even if it could be shown that suggestions were made, the Department could not therefore assume that the company agreed to the May 4 amendment.

Federal Procurement Regulations (FPR) § 1-2.405(d) (1964 ed. circ. 1) provides that the Government may waive a bidder's failure to acknowledge receipt of an amendment to an invitation for bids if the amendment has only a trivial effect on price, quality, quantity, or delivery of the item(s) required, or if the received bid "clearly indicates that the bidder received the amendment."

The company has not questioned the importance of the amendment. Indeed, we agree that the amendment has other than a trivial effect on the price and the quality of the required services. Thus, under the cited regulation, the company's bid can be considered only if it otherwise "clearly indicate[d]" that the company received the amendment. For example, if a bid contains a price for an item which has been added by an amendment, a bidder's failure to formally acknowledge the amendment can be waived. But there is not the slightest indication in the company's bid here that it received amendment No. 1.

In any event, we disagree with the company's view that its presence at the May 4 conference, coupled with its submission of a bid 2 days later, can only be seen as an acknowledgement of the amendment. Should it have been to the company's advantage to have avoided award of a contract after bid opening, it could have insisted that it never received the amendment or that it did not agree to be bound to the terms of the amendment. Allowing the company the option of avoiding award in the event it so desired would have prejudiced those bidders whose bids expressly acknowledged the amendment and who, therefore, did not have an option to avoid award.

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Protest denied.

Deputy

Robert M. ...
Comptroller General
of the United States